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In The

Supreme Court of the United States

October Term, 1983

ERNEST WALTER HOMENS,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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18/28



QUESTION PRESENTED

The question presented to this Court is whether the conduct of an assistant state's attorney in the prosecution of Petitioner violated the terms of a negotiated plea agreement to his substantial prejudice, thus denying him his constitutional right to due process of law.

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PETITION FOR A WRIT OF
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OPINION BELOW

Petitioner's Application For Leave
To Appeal was denied in an unreported
opinion by the Court of Special Appeals
of Maryland, Misc. No. 29, September
Term, 1983, filed on April 6, 1984.

JURISDICTION

The denial of Petitioner's Application For Leave To Appeal by the Court of Special Appeals of Maryland was filed on April 6, 1984. Section 12-202 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland precludes further review of his Application by the Court of Appeals. This petition was filed within sixty days of the date of filing. Petitioner maintains that this Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE

United States Constitution, Amendment Five

United States Constitution, Amendment Fourteen

Annotated Code of Maryland, Courts and Judicial Proceedings, Section 12-202

Maryland Rules of Procedure, Rule 733

Maryland Rules of Procedure, Rule 1096

STATEMENT OF THE CASE

On July 14, 1983, Petitioner was tried in the Circuit Court for Anne Arundel County, Maryland, Honorable James C. Cawood presiding, on Criminals No. 27,612. The indictment charged the Petitioner with distribution of a controlled dangerous substance and related charges. The assistant state's attorney assigned to the case was Steven R. Beard, Esquire.

At trial, a negotiated guilty plea to the distribution count, pursuant to Maryland Rule of Procedure 733 was tendered by Petitioner. The terms of the plea agreement were presented to Judge Cawood and, following questioning of Petitioner regarding the voluntariness of his guilty plea and a reading of a statement of facts to support the plea, Judge Cawood accepted the plea and the terms thereof. The terms of the plea

were that the State would nolle prosequere the remaining counts of the indictment, would not object to the Petitioner remaining on personal recognizance pending sentencing, and would remain silent at sentencing.

Between trial and sentencing, this case was reassigned to assistant state's attorney Patrick Bell, Esquire. Petitioner testified in his own behalf at sentencing and told the court that his involvement in the illegal transaction had been minimal, although acknowledging that his involvement amounted to a crime. This mitigation had been summarily presented at the trial of Petitioner, but was raised in more detail at sentencing. The state was well aware of Petitioner's position on the facts of the case at the time of the entering of the negotiated plea.

At the conclusion of Petitioner's direct testimony, Mr. Bell, in violation of the terms and spirit of the plea agreement, launched into a scathing line of cross-examination of Petitioner by which he attempted to convey to the court that Petitioner was a regular and frequent dealer of controlled dangerous substances. Nothing in the statement of facts or the presentence investigation report gave any indication of that fact. By the method and content of Mr. Bell's cross-examination, he violated the terms of the negotiated plea agreement whereby the State agreed to remain silent at sentencing. Petitioner was subsequently sentenced to a term of incarceration, which he believes he would not have been, but for the conduct of the State.

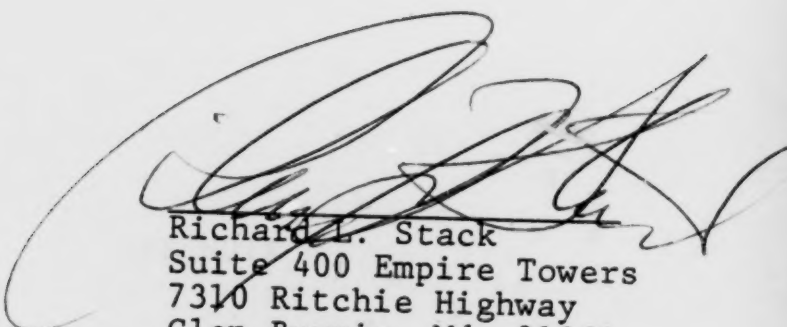
The condition of the plea agreement violated by Mr. Bell was a proper one in accord with Maryland Rule 733 a. 5.

This question was first raised, pursuant to Maryland Rule of Procedure 1096 in Petitioner's Application For Leave to Appeal. Said Application was filed timely.

ARGUMENT

This action by the State violated Petitioner's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. See Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782(). This misconduct of the prosecutor clearly resulted in substantial prejudice to Petitioner. See Wilhelm v. State, 272 Md. 404, 326 A.2d 707(1974).

Had Petitioner known that the terms of the negotiated plea agreement would not be met, he would not have entered a plea of guilty. Therefore, his plea of guilty was not voluntary.



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APPENDIX A

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Application for Leave to Appeal

Misc. No. 29

September Term, 1983

GUILTY PLEA

ERNEST WALTER HOMENS

V.

STATE OF MARYLAND

Gilbert, C.J.
Adkins
Bloom
JJ.

PER CURIAM

Filed: April 6, 1983

Ernest Walter Homens seeks leave to appeal from a guilty plea entered in the Circuit Court for Anne Arundel County (Cawood, J.). The application is devoid of merit, and it is denied.

APPLICATION FOR LEAVE TO
APPEAL DENIED

APPENDIX B

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Fourteen

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

Annotated Code of Maryland,
Courts and Judicial Proceedings
Section 12-202. Exceptions

A review by way of certiorari may not be granted by the Court of Appeals in a case or proceeding in which the Court of Special Appeals has denied or granted:

(4) Leave to appeal from a final judgment entered following a plea of guilty in a circuit court.

RULES OF PROCEDURE

Maryland Rules of Procedure,
Rule 733. Plea Agreements

a. Conditions for Agreement

The defendant or his counsel may enter into an agreement with the State's Attorney to plead guilty or nolo contendere on any proper condition including one or more of the following conditions:

5. That the State's Attorney will recommend, not oppose, or make no comment to the court with respect to a particular sentence, disposition, or other judicial action;

Maryland Rules of Procedure,
Rule 1096. Judgment Following Guilty Plea--Application for Leave To Appeal

a. Application

1. How Made--Time for Filing

Application for leave to appeal to this Court from a final judgment entered following a plea of guilty in a circuit court shall be made by filing the application with the clerk of the lower court within thirty days from the entry of the judgment appealed from.

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CLERK

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STATE OF MARYLAND,

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE COURT OF
APPEALS OF MARYLAND**

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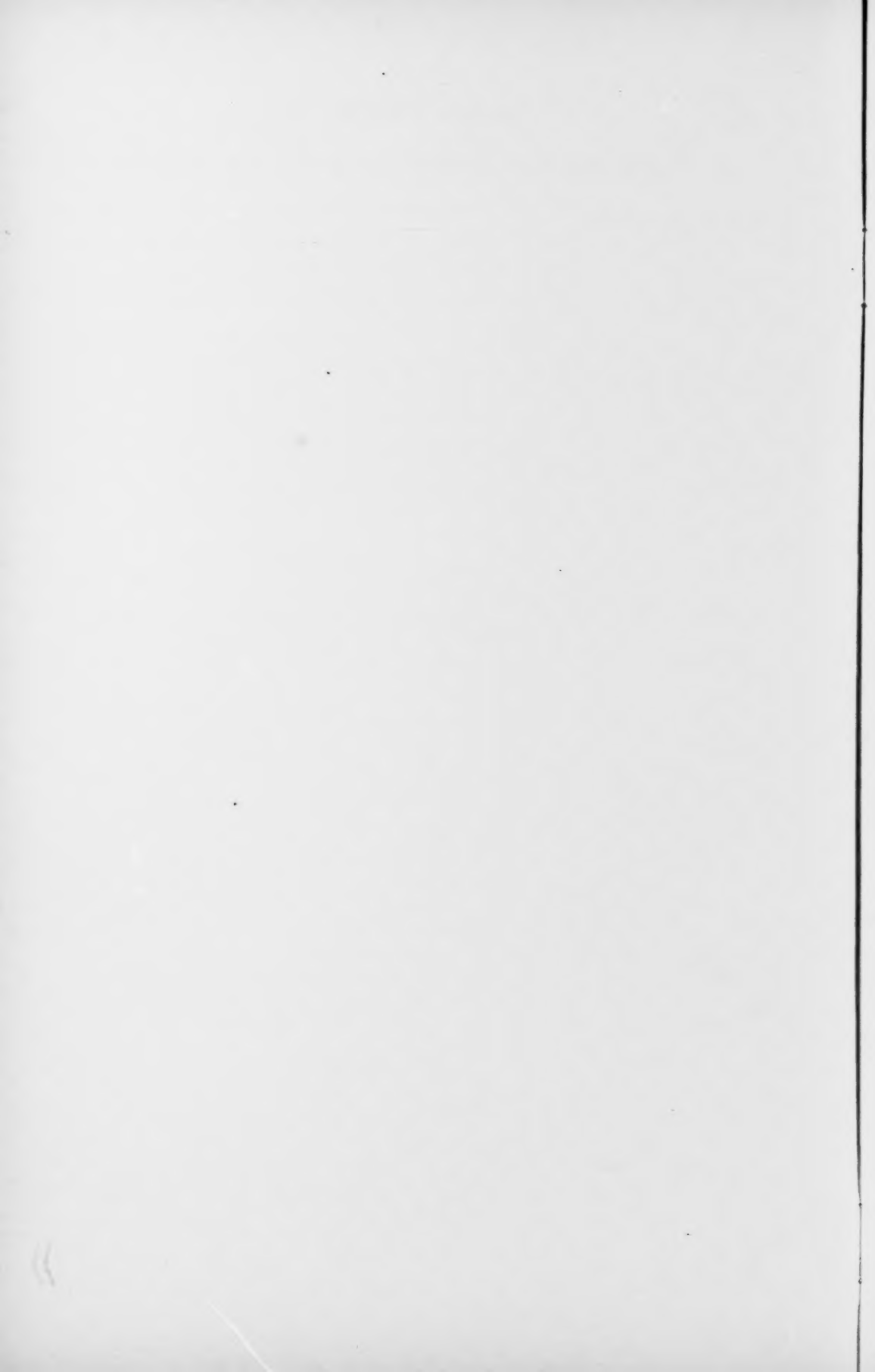
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QUESTION PRESENTED

Should this Court review a question not presented to the State courts?



Misc. No. 83-2104

IN THE
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OCTOBER TERM, 1983

ERNEST WALTER HOMENS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PRELIMINARY COMMENT

This brief is filed at this Court's request.

PERTINENT RULE OF PROCEDURE

Maryland Rule 1085. Scope of Review — Limited to

Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

STATEMENT OF THE CASE

Respondent supplements Petitioner's Statement of the Case with the following:

The taking of Petitioner's guilty plea on July 14, 1983, was preceded by the following statement of the terms of the plea agreement:

"COURT: All right. What are we entering a plea to and under what conditions, gentlemen?

[PROSECUTOR] BEARD: Your Honor, it's my understanding that the defendant will enter a plea of guilty to the first count, which alleges distribution of a controlled dangerous substance, specifically Phencyclidine.

Should the Court accept the entry of the plea of guilty to that count, the State has agreed to enter a nolle prosequere to the remaining counts, proceed on a statement of facts. I have agreed that the defendant, if the Court agrees to a PSI and I fully expect the Court to considering the nature of the offense, remain on his personal recognizance pending sentencing. And with respect to sentencing I would have no recommendation.

COURT: Okay. Is that your understanding of everything, Mr. Stack?

[DEFENSE COUNSEL] STACK: Yes, additionally however, the State is agreeing to remain silent on the issue of probation before judgement, should the Court in its wisdom deem that to be an appropriate finding, they would not take a stand for or against but would remain silent.

COURT: All right. They're going to remain silent on everything.

MR. STACK: Yes, Sir.

MR. BEARD: That's correct."

After questioning Petitioner to determine that his plea was voluntary and intelligent, the court asked the prosecutor for a statement of facts. The prosecutor stated that Petitioner sold a quantity of phencyclidine (PCP) to an undercover police officer for \$50 and stated that at one point during the pre-sale negotiations Petitioner told the officer that he was "all out of [PCP] flakes for the time being." Petitioner then disputed the allegation that he made this statement to the undercover officer, and maintained that he did "not want the Court to be left with the impression that he is a habitual dealer in drugs." The court replied "All right. We won't make any determination as to that at the present time." Petitioner then maintained that he was a mere middle man and had not profitted by the transaction. The court opined that this was irrelevant to guilt or innocence but "may be extremely important when we get to the question of sentencing."

When Petitioner appeared for sentencing on September 9, 1983, the State made no recommendation as to sentencing and stood silent while the court and defense counsel discussed at length the relevant sentencing guidelines. Petitioner's counsel called Petitioner to testify that he was not a drug dealer and only became involved in the transaction as a favor for a friend. When the State objected to detailed questioning regarding the transaction, defense counsel reminded the court that "at the time of taking the plea it was agreed between Mr. Beard and myself that ... that the statement of facts was what the State would present, that we didn't necessarily agree with it" and further that "it was agreed at that time we would reserve the right to dispute it at time of sentencing."

After Petitioner testified, the court invited the State to cross-examine him. Counsel for Petitioner did not object to the invitation, did not object to a single question posed by the State, and did not assert that the questioning was in violation of the terms of the plea agreement.

REASONS FOR DENYING THE WRIT

The question Petitioner presents was not raised or decided below. Petitioner failed to object to the cross-

examination and alleged violation of the plea agreement which he now claims denied him due process of law. Accordingly, no State court has ruled on his allegations.¹ It is well settled that this Court "will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Indeed, the Court is without jurisdiction to decide federal questions not raised and decided below. Id. at 438-439; 28 U.S.C. §1257. Accordingly, this Petition must be denied.

The reasons set forth in Cardinale, supra, at 439, for not reviewing questions not presented below are fully applicable here. The record indicates that the state's promise to remain silent at Petitioner's sentencing was merely an agreement not to recommend any particular sentence and not a promise to accept without protest any augmentation of the facts of the offense that Petitioner might present. The absence of an objection to the factual cross-examination meant that there was no opportunity to clarify the State's

¹/While the Maryland Court of Special Appeals did not say why it deemed the application for leave to appeal to be devoid of merit, it is clear that Maryland law requires timely presentation of issues to the trial court in order to preserve them for appellate review. Md. Rule 1085.

promise, if Petitioner felt that such clarification was needed. Therefore, there is no record upon which this Court could review the claimed denial of due process.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied, review being neither desirable nor in the public interest.

Respectfully submitted,

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